Supreme Court, U.S.
FILED

No. 01-011194

FEB 12 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FRANK SMALDONE,

Petitioner,

v.

DANIEL SENKOWSKI,
Superintendent, Clinton Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MELVIN L. WULF
Counsel of Record
MYRON BELDOCK
BELDOCK LEVINE & HOFFMAN, LLP
Attorneys for Petitioner
99 Park Avenue
New York, NY 10016
(212) 490-0400

47pp

QUESTIONS PRESENTED

1. Whether reliance by Petitioner's attorney upon district court opinions within the Second Circuit holding that the one-year limitations period of the Anti-Terrorism and Effective Death Penalty Act was re-set rather than merely tolled upon the proper filing of state post-conviction proceedings, a holding not held erroneous by the Second Circuit until almost two years after the attorney's reliance on those opinions, required the limitations period to be equitably tolled.

2. Whether the Second Circuit improperly declined to consider whether Zarvela v Artuz, 254 F.3d 374 (2d Cir. 2001), should be applied retroactively to Petitioner's case.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cases iii

Table of Appendices iv

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 2

Reasons For Granting The Writ 9

Conclusion 16

TABLE OF CASES

Page

Bowen v. City of New York, 476 U.S. 467 (1986) 13

Cromwell v. Keane, 33 F.Supp.2d 282 (S.D.N.Y. 1999) 11

Dupont v. Brady, 646 F.Supp. 1067 (S.D.N.Y. 1986) 12

Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001) 13

Griffin v. California, 380 U.S. 609 (1965) 8

Hill v. Keane, 984 F.Supp. 157 (E.D.N.Y. 1977) 11

Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990) ... 13

MCEG v. Phillips Nizer, 646 N.Y.S.2d 778 (Sup.Ct.N.Y.Cty 1996) 12

Seow v Artuz, 1998 WL 456416 (E.D.N.Y. June 10, 1998) 10

Smith v. McGinnis, 208 F.3d 13 (2d Cir. 2000) 11

Thompson v. Herbert, 1998 U.S.Dist. Lexis 6547 (E.D.N.Y. March 16, 1998) 11

Valentine v. Senkowski, 966 F.Supp. 239 (S.D.N.Y. 1997) ..... passim

Zarvela v Artuz, 254 F.3d 374 (2d Cir. 2001) 14

TABLE OF APPENDICES

Page

Appendix A - Opinion of the United States Court of Appeals For The Second Circuit Dated and Decided November 16, 2001 ..... 1a

Appendix B - Memorandum and Order of The United States District Court for The Eastern District of New York Dated and Filed August 3, 2000 ..... 12a

Appendix C - Memorandum and Order of The United States District Court for The Eastern District of New York Dated and Filed September 14, 1997 ..... 25a

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 273 F. 3d 133(2d Cir. 2001) (App., infra, pp. 1a-11a). The opinion of the District Court is published online at 2000 WL 1134391 (E.D.N.Y. Aug. 3, 2000)(App., infra, pp.12a-24a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 U.S.C. §2244(d) provides in relevant part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

xxxx

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Petitioner, Frank Smaldone, was convicted on April 21, 1992 of murder in the second degree with depraved indifference to human life and of arson in the third degree. He was acquitted of murder in the second degree with intent to cause the death of another person. He was sentenced to 25 years to life on the second degree murder charge and 5 to 15 years on the arson charge, the sentences to run consecutively. His conviction was affirmed by the Appellate Division, Second Department. 213 A.D.2d 685, 624 N.Y.S.2d 200 (1995). The New York State Court of Appeals denied leave to appeal. 86 N.Y.2d 784, 631 N.Y.S.2d 621 (1995).

On January 3, 1996, Petitioner and his family retained counsel to represent him in State post-conviction proceedings. It was agreed that counsel would file a motion under §440.10 of the New York Criminal Procedure Law ("§440 motion") to vacate Petitioner's conviction on the ground of ineffective assistance of trial counsel (JA. 56)[1]. The §440 motion was filed on November 29, 1996 (JA. 57,77).

During the period preceding the filing, Petitioner learned that the Antiterrorism and Effective Death Penalty Act ("AEDPA") contained a provision limiting the time within

---

[1]"JA.__" refers to the Joint Appendix filed by the parties in the Second Circuit.

which a federal habeas corpus petition could be filed, and told his stepfather, Kevin Schlosser, about the provision (JA. 77).

Petitioner mentioned the statute of limitations provision to counsel frequently before the §440 motion was filed and counsel's response was always the same: "It does not begin to run until all state post-conviction proceedings are exhausted." Petitioner, being dependent on counsel's legal knowledge, accepted what he said (JA. 57-58).

Mr. Schlosser spoke with counsel every week to discuss the background of the case and the issues to be raised in the §440 motion (JA. 77). He told Petitioner that he too frequently asked counsel about the AEDPA statute of limitations and that counsel invariably told him there was nothing to worry about since the statute of limitations did not start to run until completion of all State post-conviction proceedings (JA. 60).

As shown by counsel's letter of September 3, 1997 to Petitioner, his belief that the statute of limitations did not begin to run until all State post-conviction proceedings were completed rested upon that exact holding in Valentine v Senkowski, 966 F. Supp. 239 (S.D.N.Y. 1997)(JA. 60):

> Please find enclosed herewith is the opinion by Federal Judge Brieaunt [sic], of the Southern District Federal Court, construing the habeas statute in the context of a post-judgment "440" motion in which the 2254 proceeding was commenced within one year of the denial of his motion for leave to appeal the denial of his 440 motion - a situation which would possibly parallel your situation, should the Appellate Division deny the pending motion.

The enclosed opinion was Valentine v Senkowski, in which Judge Brieant held (966 F.Supp.at 241):

> It is clear, both from the plain meaning of the statute and the legislative history of The Act which imposed the new standard (the Antiterrorism and Effective Death Penalty Act of 1966) that the 1-year period of limitations does not begin to run until after direct review has been completed and state post-conviction review has been exhausted.

In response to one of Petitioner's questions about how the statute of limitations affected his case, counsel's letter to Petitioner dated April 11, 1997 said (JA. 58):

> In addition, I note a developing body of law relating to an April 24th date for filing habeas petitions. I have picked up the 2254 form from the Clerk's Office in the Brooklyn Federal Court. If this cutoff date is "real," it may well be that you should prepare and file it, alleging ineffective assistance of trial and appellate counsel, as well as challenging on constitutional (Jackson v Virginia) grounds the murder conviction. I enclose a copy for your use.

Petitioner promptly filed a pro se federal habeas petition in the United States District Court for the Eastern District of New York, which was assigned to Judge Sterling Johnson, Jr. Judge Johnson denied the petition on September 14, 1997 on the ground that Petitioner had not exhausted his state remedies. A copy of the opinion is in the Appendix, infra,

pp. 25a-27a. Petitioner told counsel of Judge Johnson's decision and sent him a copy of the opinion (JA. 59).

The CPL §440 motion was denied on June 27, 1997 (JA. 59). The decision was then made that, if the motion for leave to appeal were denied, counsel would file an application in the Appellate Division, Second Department, for a writ of error coram nobis to challenge Petitioner's conviction on the ground of ineffective assistance of appellate counsel (JA. 59, 77-78)[2].

The motion for leave to appeal was timely filed and it was denied on November 17, 1997 (JA. 60).

Shortly afterwards, counsel told Petitioner on the phone that he was working on the coram nobis application. During that conversation, Petitioner again asked counsel about the AEDPA statute of limitations and how it would affect his habeas corpus petition. Counsel stated that he continued to believe that the statute did not begin to run until all state post-conviction proceedings were completed (JA. 61).

Counsel filed the coram nobis application raising the issue of ineffective assistance of appellate counsel, on June 18, 1998. During the seven month period between denial of the motion to appeal dismissal of the §440 motion and the filing of the coram nobis application, both Petitioner and his stepfather persistently asked counsel about the delay in filing. Counsel kept telling them that he was working on it but that there were some delays to be expected(JA. 61, 78).

Counsel visited Petitioner at prison on February 16, 1999. They discussed the future of Petitioner's case and what had to be done if the Appellate Division denied the application for the coram nobis writ. Petitioner again expressed

---

[2]A writ of error coram nobis is the exclusive vehicle in New York State to challenge ineffectiveness of appellate counsel.

his concern about the AEDPA statute of limitations. Counsel said he still believed that the statute did not begin to run until the completion of all State post-conviction proceedings (JA. 62).

The Second Department denied the coram nobis application on February 16, 1999(JA. 62). A motion for leave to appeal to the New York Court of Appeals was denied on March 24, 1999 (JA. 38).[3]

Petitioner retained undersigned counsel on May 10, 1999 to represent him on his federal habeas petition, which was filed on June 11, 1999 (JA. 63).

Respondent moved to dismiss the petition as untimely under the AEDPA. Petitioner opposed the motion on two grounds: that, in light of counsel's reliance on Valentine v Senkowski, the petition should be deemed timely under the equitable tolling doctrine; and that the petition was timely filed if the 90-day periods within which Petitioner might have filed petitions for writs of certiorari to this Court from denial of his two state post-conviction proceedings were included within the AEDPA tolling period.[4]

The District Court rejected both arguments. As to the equitable tolling argument, it held that "there was no cognizable impediment preventing him from filing his petition on time" (App., infra, p.21a). It did not analyze the consequences of the existence of divergent lines of authority. As to the certiorari issue, it held that "§2244(d)(2) tolls the limitations period only during the time in which a state-court motion for collateral review is 'pending'" (App., infra, p.20a).

---

[3]Petitioner did not file petitions for writs of certiorari to this Court after final state denial of his §440 motion or his application for a writ of error coram nobis.

[4]Petitioner is not pursuing the latter issue in this petition.

The District Court issued a certificate of appealability as to the equitable tolling issue. The Second Circuit subsequently issued a certificate of appealability as to the certiorari issue.

The Second Circuit affirmed. As to the equitable tolling argument, it held that "attorney error [is] inadequate to create the 'extraordinary' circumstances equitable tolling requires" (App., infra, p.9a). The Court also held that "[w]e have already rejected another plea for equitable tolling based on Valentine v Senkowski, the very case on which Petitioner asserts his attorney justifiably relied. See Smith [v McGinnis, 208 F.3d 13] at 16-17 [2d Cir. 2000]" (Ibid). The Court did not mention the fact that Smith was decided almost two years after counsel's reliance on Valentine.

The Underlying Claims Are Substantial

The merits of the underlying claims of ineffective assistance of trial and appellate counsel bear on the application of the equitable tolling doctrine.

The underlying claims of ineffective assistance of trial counsel are the following. First, Petitioner not having testified, the judge, with respect to the issue of Petitioner's intention to commit the homicide, charged the jury (TT 444-445):[5]

> Indeed that's a safe method by which the intent or knowledge may be tested of this defendant since the defendant, his intent or knowledge is in question in this trial. He has an absolute right to remain silent for if he speaks, he may not speak the truth (emphasis added).

---

[5]"TT _ " refers to the transcript of Petitioner's trial in Supreme Court, Queens County.

Trial counsel did not object to this clearly unconstitutional and prejudicial charge. See Griffin v California, 380 U.S. 609 (1965). His failure to do so is a compelling example of constitutional ineffectiveness.

Second, trial counsel did not ask the court to charge the jury that it could consider whether Petitioner was guilty of the lesser included offenses of manslaughter or negligent homicide. In giving the homicide charge, the court charged only with respect to the two counts in the indictment charging murder in the second degree. Trial counsel did not take any exception to the charge (JA. 13).

Third, ballistic evidence was critical because Petitioner's defense was that the shooting was accidental, and the gun's trigger pressure was central to that issue. At trial, a ballistics expert for the People testified that between three and seven pounds of pressure were required to pull the trigger on the type of gun that caused the victim's death[6], which implied, as the prosecutor argued in his summation, that the gun had not been discharged accidentally, but rather that Petitioner intentionally pulled the trigger, which required a significant amount of pressure in order to discharge the bullet. However, trial counsel had never consulted a ballistics expert for an independent opinion as to the gun's trigger pressure, and therefore totally failed in his responsibility to learn whether the testimony of the People's expert could be challenged (JA. 14). In fact, an affidavit by a ballistics expert filed in support of Petitioner's §440 motion did challenge the testimony of the People's expert.

There were other failures by trial counsel that added to his constitutional ineffectiveness, but those specified above are sufficient in themselves to establish that, if Petitioner

---

[6]The gun itself was never found.

were allowed a federal habeas hearing, there is a significant probability that the writ would be granted.

The underlying claims of ineffective assistance of appellate counsel are the following. Appellate counsel and trial counsel were members of the same law firm. Although Petitioner and his family strongly urged appellate counsel to raise the issue of ineffective assistance of trial counsel based upon the errors described above, he did not do so (JA. 19, 20, 25-26). There is every reason to believe, and a hearing would establish, that appellate counsel failed to raise those issues because it would embarrass his law partner and his law firm. There was therefore an obvious conflict of interest between his duty to Petitioner and his relationship with his law partner. There is further evidence of appellate counsel's constitutional ineffectiveness that would be shown in a habeas hearing, but the gross conflict of interest described above, is sufficient to establish on its own that appellate counsel was constitutionally ineffective.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Second Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Furthermore, there is a conflict in the Circuits as to how the doctrine of equitable tolling is to be construed and applied.

1. Equitable Tolling. Although Petitioner has compelling claims that both his trial and appellate counsel were constitutionally ineffective, he has been deprived of the right to federal habeas review by too narrow an interpretation of the doctrine of equitable tolling. Specifically, the court below refused to apply the doctrine even though Petitioner's late filing of his habeas petition was due to his attorney's reliance on case

law that was held to be erroneous by the Second Circuit only well after the relevant state court post-conviction proceedings were filed. It is fundamentally unfair to deprive Petitioner of habeas review where his attorney relied on unreversed case law in deciding how the AEDPA statute of limitations was to be interpreted.

The sequence of relevant events is critical. The record clearly shows that Petitioner diligently pursued his post-conviction remedies. Post-conviction counsel was retained in January 1996, a few months after completion of direct review of Petitioner's conviction in the State courts in July 1995. The AEDPA became effective on April 24, 1996. Counsel filed a §440 motion to vacate Petitioner's conviction on the ground of constitutionally ineffective assistance of trial counsel on November 29, 1996, well within the AEDPA's one-year statute of limitations. That motion was finally denied on appeal on November 17, 1997.

In the meantime, on June 10, 1997, Judge Brieant handed down his decision in Valentine v Senkowski, supra, which held that "the one-year period of limitations [of the AEDPA] does not begin to run until after direct review has been completed and state post-conviction review has been exhausted" (966 F.Supp. at 241).

Relying on that holding, counsel filed an application for a writ of error coram nobis on the ground of constitutionally ineffective assistance of appellate counsel on June 18, 1998[7]. At that time, the Valentine holding was still good law, and the Second Circuit did not reject its construction

---

[7]During that period, Petitioner and his family diligently raised with counsel the applicability of the AEDPA statute limitations, and they were assured again that it did not begin to run until completion of state post-conviction proceedings.

of the tolling provision until March 13, 2000 in Smith v McGinnis, 208 F.3d. 13 (2d. Cir. 2000), almost two years after Petitioner's coram nobis application was filed.

During the period from November 1996, when Petitioner's §440 motion was filed, to June 1998, when his coram nobis was filed, there were divergent district court opinions within the Circuit as to whether the AEDPA limitations provision was tolled or re-set by the filing of State post-conviction proceedings. Valentine itself was cited with approval in Hill v Keane, 984 F.Supp. 157,159 (E.D.N.Y. 1977), and Thompson v Herbert, 1998 U.S. Dist. Lexis 6547 (E.D.N.Y. March 16, 1998). It was not until Seow v Artuz, 1998 WL 456416 (E.D.N.Y. June 10, 1998), decided eight days before counsel filed Petitioner's coram nobis application, that any district court within the Second Circuit explicitly rejected Judge Brieant's construction of the AEDPA tolling period in Valentine. Other district courts decisions within the Second Circuit during 1998, without referring to Valentine, read the AEDPA tolling provision as merely tolling the one-year limitations period during the pendency of properly filed state post-conviction proceedings and resuming upon final denial of such proceedings. See cases collected in Cromwell v Keane, 33 F.Supp.2d 282, 285-286 (S.D.N.Y. 1999). During that period, however, there was no dispositive decision by the Second Circuit on the issue.

Notwithstanding Petitioner's diligence and his counsel's reliance on unreversed case law, the Second Circuit justified its result by stating that "we have already rejected another plea for equitable tolling based on Valentine v Senkowski, the very case on which petitioner asserts his attorney justifiably relied. See Smith, 208 F.3d at 16-7" (App., infra, p.9a). The Court ignored the fact that Smith came down almost two years after petitioner's attorney's reliance on

Valentine, and thus failed to consider the question whether counsel's reliance was justified in the circumstances. If it had, it could not have dismissed counsel's reliance on Valentine as "attorney error", a "mistake" or "attorney negligence" (Ibid). None of those terms apply because it is not a "mistake", or an "error", or "negligent' for a practicing lawyer to rely on unreversed lower court case law. To the contrary, counsel's reliance on Valentine was reasonable in every sense of the word.

The failure to apply the equitable tolling doctrine in these circumstances, threatens the ability of practicing lawyers to represent their clients effectively. The use of precedent is the foundation on which the practice of law rests. It is therefore inequitable to penalize a litigant - particularly where constitutional rights are at stake - because his lawyer reasonably relied on published precedent that was later reversed. It is a paradox that, although Petitioner has been deprived of the opportunity of federal habeas review of compelling constitutional issues in his case, his lawyer, quite properly, is not subject to being penalized because it later turned out that his reliance on published unreversed case law was mistaken. See MCEG v Phillips Nizer, 646 N.Y.S.2d 778,780 (Sup.Ct. N.Y.Cty 1996) ("...[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt"); DuPont v Brady, 646 F.Supp. 1067, 1076 (S.D.N.Y. 1986)("where a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment for which he is not liable.") Neither do lower court judges whose decisions are later declared on appeal to be erroneous, suffer any consequences. Thus, although both Judge Brieant and Petitioner's lawyer were found in retrospect to have misjudged the law, it is Petitioner who pays the price. Equity should

protect Petitioner against such an unfair result.

Certiorari should therefore be granted so that the Court can decide whether the equitable tolling doctrine must be applied in these circumstances.

Certiorari should also be granted because there is a conflict in the Circuits as to the construction and application of the equitable tolling doctrine in AEDPA cases.

Irwin v Dept of Veterans Affairs, 498 U.S. 89,96 (1990), held that "the principles of equitable tolling ... do not extend to what is best a garden variety claim of excusable neglect." It made no reference to the need for "extraordinary circumstances" as a condition for application of the equitable tolling doctrine. Bowen v City of New York, 476 U.S. 467, 482 (1986), held that the equitable tolling doctrine would be applied when "it would be unfair" not to. Ignoring those parameters, the Second Circuit declined to apply the doctrine except in "extraordinary circumstances" (App., infra, p.9a). Fairness does not enter into its calculation. On the other hand, fairness is an explicit part of the equitable tolling calculation in the Third Circuit.

In Fahy v Horn, 240 F.3d 239 (3d. Cir. 2001), a capital case, the one-year AEDPA statute of limitations had expired prior to the filing of defendant's federal habeas. It had expired because the time during which defendant's state post-conviction proceeding was pending was held not to have been a "properly filed" petition and the time during which it was pending was therefore to be excluded from the tolling period. However, the Third Circuit equitably tolled the statute (240 F.3d at 245):

> In a capital case such as this, the consequences of error are terminal and we therefore pay particular attention to whether principles of

> "equity would make the rigid application of a limitation period unfair" and whether the petitioner has "exercised reasonable diligence in investigating and bringing [the] claims."

The Court added that "the applicable law is so ... unsettled, we must allow less than 'extraordinary' circumstances to trigger equitable tolling..." Noting that the law involved was "inhibitively opaque", the Court said that "If we could not predict how the Pennsylvania court would rule on this matter, then surely we should not demand such foresight from the petitioner" (Ibid). Based on those considerations, the court equitably tolled the statute.

Except for the fact that the case at bar is not a capital case[8], the cases are virtually identical although the results are completely different. At the time the decisions were being made here by counsel, the law regarding the construction of the AEDPA was "unsettled". There were decisions supporting counsel's view and decisions taking the position ultimately adopted by the Second Circuit. But in the period 1996-1998, the cases went both ways, and the outcome was not predictable. Thus, the opinions of the Second and Third Circuits are in direct conflict, and the Court should grant certiorari to resolve the conflict as to the circumstances that require application of the equitable tolling doctrine in AEDPA cases.

2. The Zarvela issue. In Zarvela v Artuz, 254 F.3d 374 (2d Cir. 2001), the Second Circuit held that when

---

[8]Though not capital, its consequences for Petitioner are nonetheless profound. At the time of his arrest in November 1991, Petitioner was 19 years old (JA. 10). Upon conviction, he was sentenced to 30 years to life and he may spend his entire life in prison.

a petition for a writ of habeas corpus contains both exhausted and unexhausted claims, the appropriate response by the district courts is to dismiss only the unexhausted claims and to stay proceedings as to the exhausted claims. The stay is to be conditioned on petitioner's initiation of exhaustion in the State courts within a limited period, "normally" a period of 30 days and a return to the district court after exhaustion is completed, also "normally" a period of thirty days. 254 F.3d at 381.

Since Petitioner had filed a timely pro se petition for a writ of habeas corpus in April 1997, which was dismissed in its entirety in September 1997 without distinguishing between exhausted and unexhausted claims, Petitioner moved in the Second Circuit prior to argument of this case for leave to file a supplemental brief to argue for retroactive application of Zarvela to his case. The motion was granted, supplemental briefs were filed by the parties, and the issue was addressed at oral argument.

In its opinion, the Second Circuit declined to consider the Zarvela issue, holding that it lacked jurisdiction on the ground that the claim "is not included under the certificate of appealability as amended" and "[a] supplemental brief motion cannot, therefore, place the issue properly before this Court" (App., infra, p.11a).

Petitioner's motion to file a supplemental brief to consider the Zarvela issue was the functional equivalent of a motion for a certificate of appealability and should have been treated as such. The disposition by the Second Circuit further denied Petitioner the right to have his substantial constitutional claims decided on the merits. Certiorari should therefore be granted so that this Court can decide whether the Second Circuit should have entertained the Zarvela claim on its merits.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Melvin L. Wulf
Counsel of Record

Myron Beldock
Beldock Levine & Hoffman, LLP
99 Park Avenue, 16th Floor
New York, New York 10016
(212) 490-0400

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED NOVEMBER 16, 2001

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2001

(Argued: October 26, 2001) (Decided: NOV 16, 2001)

Docket No. 00-2519

FRANK SMALDONE,

Petitioner-Appellant,

v.

DANIEL SENKOWSKI, Superintendant, Clinton Correctional Facility,

Respondent-Appellee.

BEFORE: FEINBERG, MCLAUGHLIN, and F.I. PARKER, *Circuit Judges.*

Petitioner-Appellant Frank Smaldone appeals from the denial of his petition for a writ of habeas corpus on August 3, 2000 in the United States District Court for the Eastern District of New York (John Gleeson, *judge*). The Court

reviews Smaldone's appeal under a certificate of appealability granted by the district court on September 20, 2000 and expanded by this Court on March 23, 2001.

AFFIRMED.

* * *

PER CURIAM:

Petitioner-Appellant Frank Smaldone appeals from the denial of his petition for a writ of habeas corpus on August 3, 2000 in the United States District Court for the Eastern District of New York (John Gleeson, *Judge*), under a certificate of appealability granted by the district court on September 20, 2000 and expanded by this Court on March 23, 2001. For substantially the same reasons set forth by the district court, we AFFIRM.

Smaldone was convicted for murder in the second degree and arson in the third degree by a New York state court in 1992. *Smaldone v. Senkowski*, No. 99-CV-3318 JG, 2000 WL 1134391, at *1 (E.D.N.Y. Aug. 3, 2000). After his conviction was affirmed on direct appeal, Smaldone began to pursue collateral relief in the state courts. *Id.* at *1. While his motion under New York Criminal Procedure Law § 440 was pending in the state court system, Smaldone filed pro se for federal habeas relief. The United States District Court for the Eastern District of New York dismissed his petition without prejudice for lack of exhaustion on September 19, 1997. *Id.* The court included in its dismissal order a warning about the one-year statute of limitations for filing of federal habeas petitions

under the 1996 Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). After pursuing the § 440 motion and a coram nobis petition in the state courts, Smaldone attempted to return to the federal system on June 11, 1999. *Id.* at *3. The district court dismissed the petition as untimely under the AEDPA's implied one-year grace period, and found no basis for "equitable tolling" of the limitation period. *Id.* at *5-*6.

This Court has jurisdiction to consider Smaldone's appeal under a certificate of appealability granted by the district court on the issue of "whether [Smaldone's attorney's] mistaken belief that AEDPA's one-year limitation period is re-set (rather than merely tolled) by pending state petitions for post-conviction review should result in equitable tolling of the limitation period," and amended by this Court to include a second issue, "whether the ninety-day period available for seeking a writ of certiorari from the United States Supreme Court upon exhausting state appellate procedures governing state post-conviction or other collateral review, is included in the time tolled under 28 U.S.C. § 2244(d)(2)." *See* 28 U.S.C. § 2253. Although in answering the certified questions we affirm the district court's denial of Smaldone's petition for substantially the same reasons set forth by the district court, we write a brief opinion to express our intent to join our sister circuits, though on a somewhat narrower basis, in rejecting the inclusion of the ninety-day period during which a petitioner could have filed a certiorari petition after the denial of his state post-conviction petition under the tolling provision of 28 U.S.C. § 2244(d)(2).

Appendix A

A. Tolling for Supreme Court Review

The AEDPA imposed for the first time a one-year statute of limitations for the filing of federal habeas petitions. 28 U.S.C. § 2244(d)(1).[1] To support the federal interest in comity and finality of state court judgments, *see Duncan v. Walker*, 121 S.Ct. 2120, 2128 (2001), AEDPA added to this

---

1. Specifically, the AEDPA provides in § 2244(d)(1):

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

time constraint a tolling provision allowing courts to suspend the progress of the statute of limitations for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Because petitioner raises a question of law as to whether this provision may include the ninety-day period for pursuit of certiorari on state collateral motions, we review the district court's dismissal of Smaldone's habeas petition de novo. *See Williams v. Artuz*, 237 F.3d 147, 150 (2d Cir. 2001); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999).

Other circuits examining this issue have found, with some variation in the breadth of their holdings, that the statute of limitations should not toll during the period for seeking certiorari. *See Stokes v. Philadelphia*, 247 F.3d 539, 542 (3d Cir. 2001); *Crawley v. Catoe*, 257 F.3d 395, 399-401 (4th Cir. 2001); *Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001); *Isham v. Randle*, 226 F.3d 691, 695 (6th Cir. 2000); *Gutierrez v. Schomig*, 233 F.3d 490, 491-92 (7th Cir. 2000) (limiting the holding to prevent tolling during the ninety-day period in cases in which a petition is not actually filed); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999).

To determine whether to join our sister circuits in rejecting tolling for the certiorari period, we will consider the various reasons for their decisions. "We begin, as always, with the language of the statute." *Duncan*, 121 S.Ct. at 2124.

As several other circuits have noted, the timing-related language in § 2244(d)(2) differs from that in § 2244(d)(1)(A). Specifically, § 2244(d)(1)(A), describing the point at which the statute of limitations should begin to run, notes that the key date is "the date on which the judgment became final by the conclusion of direct review *or the expiration of the time for seeking such review.*" 28 U.S.C. § 2244(d)(1)(A) (emphasis added). Notably, § 2244(d)(2) does not mention a time period for the pursuit of additional review. 28 U.S.C. § 2244(d)(2). As the Supreme Court said in *Duncan*, "[i]t is well settled that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Duncan*, 121 S. Ct. at 2125 (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)). Thus, the Third, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have concluded that this omission demonstrates Congress's intent not to include a period for certiorari petitioning under the tolling provision. *See Stokes*, 247 F.3d at 542; *Crawley*, 257 F.3d at 400; *Snow*, 238 F.3d at 1036; *Isham*, 226 F.3d at 695; *Coates*, 211 F.3d at 1227; *Ott*, 192 F.3d at 513; *Rhine*, 182 F.3d at 1155.

Several circuits have also stressed the importance of the modification of "post-conviction or other collateral review" by the word "State." While the Supreme Court held only that the inclusion of "State" in the § 2244(d)(2) phrase prevented tolling of the limitations period during consideration of federal habeas petitions, these circuits have further concluded that the restriction to "State" post-collateral and other forms of review excludes tolling during petition for Supreme Court

review of state post-conviction claims. *See Stokes*, 247 F.3d at 542; *Crawley*, 257 F.3d at 400; *Isham*, 226 F.3d at 695; *Rhine*, 182 F.3d at 1156. In the words of the Tenth Circuit, "[a] petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review." *Rhine*, 182 F.3d at 1156.

Several circuits further note that by excluding the time period for certiorari petitions after post-conviction proceedings from the tolling provision, Congress mirrored the exhaustion requirements for submission of a federal habeas claim. *See Snow*, 238 F.3d at 1036; *Isham*, 226 F.3d at 695; *Ott*, 192 F.3d at 513. Before a federal district court may consider a petitioner's habeas claims, the petitioner must exhaust in the state courts any constitutional claims he wishes to raise in the federal forum. *See Zarvela v. Artuz*, 254 F.3d 374, 378 (2d Cir. 2001). This exhaustion requirement does not, however, require petitioner to seek certiorari from the Supreme Court on the basis of the state court's denial of post-conviction relief before pursuing a federal remedy. *See Snow*, 238 F.3d at 1036. Thus, these circuits infer that if the petitioner is not required to turn to the Supreme Court before qualifying for federal habeas review — review that could potentially undo the state court's verdict — the tolling period does not need to include the period required to seek such review in order to protect the finality of state judgments. Noting that a petitioner could file for federal habeas during this period, they conclude that it is "unlikely" Congress intended to allow such tolling, when its stated goals included "curb[ing] the protracted nature of habeas corpus proceedings." *Isham*, 226 F.3d at 695.

We find it unnecessary, however, to resolve these issues on the facts before us. We reach this conclusion because we find the language of the tolling provision to be explicit for cases like this one, where no certiorari petition was filed. Section 2244(d)(2) expressly provides that the limitations period is tolled during the time that "a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment claim is *pending*." 28 U.S.C. § 2244(d)(2) (emphasis added). Because Smaldone never sought certiorari from the Supreme Court, no application for review was either "properly filed" or "pending" here, and thus the statute was not tolled. We therefore exclude from tolling under 28 U.S.C. § 2244(d)(2) the ninety-day period during which a petitioner could have but did not file a certiorari petition to the United States Supreme Court from the denial of a state post-conviction petition. Our holding is limited to the facts of this case, and we do not reach the questions that would have been raised if a certiorari petition had been properly filed. *See also Gutierrez v. Schomig*, 233 F.3d 490, 491-92 (7th Cir. 2000) (similarly limiting the Seventh Circuit's holding to preclude tolling during the ninety-day period for certiorari when no petition was filed).

B. Equitable Tolling

Petitioner also asks whether his attorney's mistaken belief that AEDPA's one-year limitation period is "reset" rather than tolled by state post-conviction petitions should result in equitable tolling of the limitation period.

This Court has joined the majority of circuit courts in formally recognizing the application of equitable tolling to the one-year grace period implied for petitioners convicted prior to AEDPA's passage in 1996. *See Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). Equitable tolling, however, is only appropriate in "rare and exceptional circumstances." *Id.* To merit application of equitable tolling, the petitioner must demonstrate that he acted with "reasonable diligence" during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances "beyond his control" prevented successful filing during that time. *See id.*; *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999).

This Circuit, like her sisters, has found attorney error inadequate to create the "extraordinary" circumstances equitable tolling requires. *See Geraci v. Senkowski*, 211 F.3d 6, 9 (2d Cir. 2000) (attorney's misunderstanding of the period for which a claim remained "pending" did not warrant equitable tolling); *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001)("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling"); *Taliani v. Chrans*, 189 F.3d 597, 598 ("a lawyer's mistake is not a valid basis for equitable tolling"); *Sandvik v. United States*, 177 F.3d 1269, 1270 (11th Cir. 1999) ("mere attorney negligence . . . is not a basis for equitable tolling").

Additionally, we have already rejected another plea for equitable tolling based on *Valentine v. Senkowski*, 966 F.Supp. 239, 241 (S.D.N.Y.1997), the very case on which petitioner asserts his attorney justifiably relied. *See Smith*, 208 F.3d at 16-17. Furthermore, we find § 2244(d)(2)'s tolling

provision unambiguous in its intention to prevent certain periods from "counting toward" the one-year statute. *See* 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending *shall not be counted toward* any period of limitation under this subsection.") (emphasis added). Thus, we answer petitioner's equitable tolling question also in the negative, finding that the attorney's mistaken belief that the tolling period reset after each state collateral appeal does not constitute the "extraordinary" circumstances warranting equitable tolling.

C. Supplemental Claim

Petitioner submits a supplemental brief asking this Court to apply retroactively its June 14, 2001 decision in *Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001).

As Amended by the AEDPA, 28 U.S.C. § 2253 provides guidelines for an appeal from a dismissal of a petition for habeas corpus in the federal district court.

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has

> made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253. This Court has interpreted § 2253's requirement to preclude consideration of issues outside the certificate of appealability. *See Green v. United States*, 260 F.3d 78, 85 (2d Cir. 2001) (finding lack of appellate jurisdiction to reach an equitable tolling argument not included in the certificate of appealability); *Armienti v. United States*, 234 F.3d 820, 824 (2d Cir. 2000) ("We will not address a claim not included in the certificate of appealability"). Because petitioner's supplemental claim is not included under the certificate of appealability as amended, we lack jurisdiction to consider the question at this time. The parties suggest that this issue is included under the certificate of appealability because this Court granted a Motion to file a Supplemental Brief addressing the *Zarvela* issue. The suggestion is rejected. In most instances (as in this one), a motion to file a supplemental brief requires no showing of a denial of a constitutional right. The requirement of a "substantial showing of the denial of a constitutional right" must be addressed before a certificate of appealability may issue. The specific requirements of the AEDPA may not be satisfied other than through direct consideration of the appealability of a question. A supplemental brief motion cannot, therefore, place the issue properly before this Court.

For the reasons set forth above, the ruling of the district court is AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AUGUST 3, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-3318 (JG)

FRANK SMALDONE,

Petitioner,

-against-

DANIEL SENKOWSKI, Superintendant,
Clinton Correctional Facility,

Respondent.

* * *

MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

Respondent has moved to dismiss as untimely this petition for a writ of habeas corpus. The petitioner contends that the petition was timely filed and, in the alternative, that equity should excuse its lateness because the delay was the result of attorney error. Finding the petition untimely and the doctrine of equitable tolling inapplicable, I dismiss the petition.

Appendix B

BACKGROUND

Petitioner Frank Smaldone was convicted after a jury trial in 1992 of murder in the second degree and arson in the third degree. (Affidavit of Sharon Y. Brodt in Support of Motion to Dismiss ("Brodt Affidavit"), ¶¶ 5-6.) On May 18, 1992, Smaldone was sentenced to consecutive terms of 25 years to life on the murder conviction and five to 15 years on the arson conviction. (*Id.*, ¶ 6.)

The Appellate Division, Second Department affirmed Smaldone's conviction on March 27, 1995. *See People v. Smaldone*, 624 N.Y.S.2d 200 (2d Dep't 1995). On July 6, 1995, Smaldone was denied leave to appeal to the New York Court of Appeals. *See People v. Smaldone*, 86 N.Y.2d 784 (1995).

On January 3, 1996, Smaldone and his family retained Robert Bennet Adler to handle Smaldone's state collateral challenges to his conviction. (Affidavit of Frank Smaldone ("Smaldone Affidavit"), ¶ 3.) At some point after Adler was retained, Smaldone became aware of the statute of limitations provision contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. 104-132, 110 Stat. 1214 (1996), relevant portion codified at 28 U.S.C. § 2244(d)(1). (*Id.*, ¶ 6.) During the course of Adler's preparation of Smaldone's first collateral challenge in state court, Smaldone mentioned the statute of limitations to him "frequently." (*Id.*) Each time, Adler told Smaldone that the statute period did not start running "until all state post-conviction proceedings are exhausted."[1] (*Id.*, ¶ 7.) During this period, Smaldone's step-

1. All of the contentions regarding Adler in this background section are drawn from the affidavit of Smaldone and Kevin (Cont'd)

father also asked Adler "many times" about the AEDPA statute of limitations. (Affidavit of Kevin Schlosser ("Schlosser Affidavit"), ¶ 6.) "[H]is answer always was that 'The statute of limitations does not begin to run until all state post-conviction proceedings are complete.' " (*Id.*)

On November 29, 1996, Adler filed a motion to vacate Smaldone's conviction pursuant to N.Y. Crim. Proc. Law §§ 440.10 & 440.20 in the Supreme Court, Queens County. (Brodt Affidavit, ¶ 9; Smaldone Affidavit, ¶ 4.)

On April 11, 1997, Adler wrote to Smaldone to advise him that he was awaiting word from the Supreme Court on an oral argument date for the § 440 motion. (Exh. A. to Smaldone Affidavit.) Adler also stated the following:

> In addition, I note a developing body of law relating to an April 24th date for filing habeas petitions. I have picked up the 2254 form from the Clerk's Office in the Brooklyn Federal Court for you. If this cutoff date is 'real,' it may well be that you should prepare and file it, alleging ineffective assistance of trial and appellate counsel, as well as challenging on constitutional (*Jackson v. Virginia*) grounds the murder conviction. I enclose a copy for your use.

(*Id.*)

(Cont'd)

Schlosser, his step-father, and from supporting exhibits. Respondent has not provided an affidavit from Bennett, nor has respondent requested an evidentiary hearing at which Bennett would be afforded an opportunity to testify. With the case in this procedural posture, all of petitioner's contentions about Adler must be accepted as true.

Appendix B

On April 24, 1997, Smaldone wrote to Adler to express his dismay that the attorney had advised him to file a habeas petition *pro se*. (Exh. B. to Smaldone Affidavit.) In the letter, Smaldone indicated that he believed that Adler should have filed the petition. Nonetheless, Smaldone advised Adler that he was filing a petition and included a copy for him. (*Id.*)

On April 25, 1997, Smaldone filed a *pro se* petition for a writ of habeas corpus in this Court. (Brodt Affidavit, ¶ 12.)

On June 27, 1997, the Supreme Court denied Smaldone's § 440 petition. (Brodt Affidavit, ¶ 11; Smaldone Affidavit, ¶ 12.) On August 14, 1997, Smaldone sought leave to appeal the Supreme Court's denial of his § 440 petition. (Brodt Affidavit, ¶ 11.)

On September 3, 1997, Adler wrote to Smaldone and included a copy of an opinion from the United States District Court for the Southern District of New York, "construing the habeas statute in the context of a post-judgment '440' motion in which the 2254 proceeding was commenced within one year of the denial of his 440 motion." (Exh. D to Smaldone Affidavit.) Adler stated that the fact pattern addressed in the opinion "would possibly parallel your situation, should the Appellate Division deny the pending motion." (*Id.*) The enclosed opinion was *Valentine v. Senkowski*, 966 F.Supp. 239 (S.D.N.Y.1997), which held that "the 1-year period of limitations does not begin to run until after direct review has been completed and state post-conviction review has been exhausted." *Id.* at 241.

On September 19, 1997, Judge Sterling Johnson of this Court dismissed Smaldone's habeas petition without prejudice to refiling upon exhaustion of state court remedies.

Appendix B

Judge Johnson's memorandum and order included an admonition that the statute of limitations was tolled, not "reset," by pending state court petitions for collateral review of final convictions: "Petitioner is reminded that the recent amendment to the habeas corpus statute imposes a one-year statute of limitations for filing non-capital habeas corpus petitions in federal court. In most cases, the one year period will start to run on the date on which the state court judgment became final by the conclusion of direct review, although the statute of limitations is tolled while a properly filed application for state post-conviction or other collateral review is pending." (*Smaldone v. Senkowski*, 97 CV 2225, Sept. 19, 1997, at 4 (internal citations omitted).)

Smaldone advised Adler of Judge Johnson's decision. (Smaldone Affidavit, ¶ 11.)

On November 17, 1997, leave to appeal the Supreme Court's denial of the § 440 petition to the Appellate Division, Second Department was denied. (Brodt Affidavit, ¶ 11; Smaldone Affidavit, ¶ 17.) Shortly thereafter, Smaldone and Adler spoke on the phone, and Adler advised Smaldone that he was preparing an application for a writ of error coram nobis. (Smaldone Affidavit, ¶ 18.) Smaldone again raised the subject of the AEDPA statute of limitations. (*Id.*) Adler told him he was "conferring with others on the point, but still believed that the statute did not begin to run until all state post-conviction proceedings were completed." (*Id.*)

For the next seven months, Smaldone and his step-father "hounded" Adler about filing the coram nobis petition, but Adler told them that he was working on it and that "some delays were to be expected." (Smaldone Affidavit, ¶ 20; Schlosser Affidavit, ¶ 9.) During this period, Schlosser also

asked Adler "again and again" about the AEDPA statute of limitations, and each time Adler assured him that it did not begin running until after the exhaustion of all state post-conviction remedies. (Schlosser Affidavit, ¶ 9.)

On June 8, 1998, Adler filed the application for a writ of error coram nobis in the Appellate Division. (Brodt Affidavit, ¶ 14.)

On February 16, 1999, Adler met with Smaldone in prison to talk about his case and the available options should the Appellate Division deny the coram nobis petition. Smaldone again raised his concern about AEDPA's statute of limitations; Adler told him that "he was still researching the matter, but still believed that the statute did not begin to run until the completion of all state post-conviction proceedings." (Smaldone Affidavit, ¶ 22.) On the same day, the Appellate Division denied the coram nobis petition. *See People v. Smaldone*, 683 N.Y.S.2d 905 (2d Dep't 1999).

On March 1, 1999, Adler wrote to Smaldone to advise him that Appellate Division denials of coram nobis applications were not appealable to the Court of Appeals. (Exh. F to Smaldone Affidavit.) Adler told Smaldone that he would nonetheless seek leave to appeal, "lest any stone be left unturned." (*Id.*) "It will then be up to Judge Johnson to decide your writ," the letter continued, "which should be redrafted to include the instant issue." (*Id.*)

As promised, Adler sought leave to appeal to the New York Court of Appeals on Smaldone's behalf, and, as predicted, that application was dismissed on March 24, 1999, for lack of appellate jurisdiction. *See People v. Smaldone*, 93 N.Y.2d 878 (1999).

Appendix B

The instant petition for a writ of habeas corpus was filed on June 11, 1999. Now before the Court is a motion by respondent to dismiss the petition as untimely.

DISCUSSION

A. Timeliness of the Petition

Under AEDPA, a habeas petitioner must file his application for relief within a one-year period of limitations that generally runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). AEDPA also provides that this one-year period is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2). Contrary to *Valentine* (and to the view Adler expressed to Smaldone), it is now settled that this is merely a tolling provision; a state court's rejection of a properly filed application for post-conviction relief does not "reset" the AEDPA statute of limitations clock. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Apr. 17, 2000) (No. 99-9695).

Prisoners whose convictions became final before the enactment of AEDPA, like Smaldone, had a one-year grace period — from AEDPA's enactment on April 24, 1996, until April 24, 1997 — to file their petitions. *See Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998). That grace period is also subject to tolling by a "properly filed application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2). *Smith*, 208 F.3d at 15.

Applying these principles to Smaldone's case, it is clear that his petition is untimely. The statute of limitations began running upon enactment of AEDPA on April 24, 1996, and continued for more than seven months until the November 29, 1996, filing of the § 440 petition. The statute was then tolled until November 17, 1997, when the Appellate Division denied leave to appeal the Supreme Court's denial of the § 440 petition. The statute period then ran for nearly seven months more - and expired - between November 17, 1997 and the filing of the coram nobis petition on June 8, 1998. Had it not already expired, the statute period would have then been tolled until February 16, 1999, when the Appellate Division denied the coram nobis petition. It then ran nearly another four months until the filing of the instant petition.

The statute of limitations therefore ran for more than 17 months and is untimely. In order to avoid this result, Smaldone would add 90 days to the tolling provided by the pendency of the § 440 and coram nobis petitions in the New York courts[2] to account for the time during which Smaldone could have filed petitions for writs of certiorari in the United States Supreme Court. This argument is meritless. The 90-day period for seeking certiorari is relevant

---

2. Smaldone argues that this 90-day period should be measured from the Appellate Division's denial of the coram nobis petition, rendering it unnecessary to decide whether the doomed effort to appeal that decision to the New York Court of Appeals tolled the AEDPA statute of limitations. If Smaldone had argued for tolling through the Court of Appeals's dismissal, I would have rejected the contention for the reasons I stated in *Harrison v. Artuz*, ___ F.Supp.2d ___, ___, No. 98-CV-3666, 2000 WL 914661, at * 3 - *4 (E.D.N.Y. June 30, 2000).

to determining only the point at which a judgment becomes final, as it frequently is the point at which the time for seeking direct review has expired. *See* 28 U.S.C. § 2244(d)(1)(A). Section 2244(d)(2), by contrast, does not contain § 2244(d)(1)(A)'s reference to the "expiration of the time for seeking . . . review." Instead, § 2244(d)(2) tolls the limitations period only during the time in which a state-court motion for collateral review is "pending." Thus, assuming Smaldone could have petitioned for a writ of certiorari from the Appellate Division's orders, he did not do so. His § 440 and coram nobis petitions were therefore not "pending" after they were denied. *See Geraci v. Senkowski*, 211 F.3d 6, 9 (2d Cir. 2000) (statute of limitations period begins running when Appellate Division denies coram nobis petition).

B. Equitable Tolling

Smaldone also argues that even if his petition is untimely, the statute of limitations should be equitably tolled to allow consideration of the petition on the merits. He argues that it was reasonable for Adler to rely on *Valentine v. Senkowski*, 966 F.Supp. 239 (S.D.N.Y.1997), in advising Smaldone that he would have a year to file his habeas petition after the end of state collateral review. Although numerous district courts disagreed with *Valentine* after it was issued, Smaldone points out that the Second Circuit did not explicitly reject *Valentine*'s construction of AEDPA until it decided *Smith v. McGinnis*, 208 F.3d 13 (2d Cir. 2000), in March of this year. In the alternative, Smaldone contends that Adler's advice was unreasonable and that Smaldone therefore suffered from ineffective assistance of counsel. In either case, Smaldone contends that he should not be punished for his attorney's error.

Appendix B

Although the Second Circuit has held that equitable tolling is available to habeas petitioners, it has said that the doctrine will apply "only in the 'rare and exceptional circumstance[ ].' " *Smith*, 208 F.3d at 17 (quoting *Turner v. Johnson*, 177 F.3d 390, 391-92 (5th Cir.), *cert. denied*, 120 S.Ct. 504 (1999)). To obtain the benefit of equitable tolling, a petitioner must make two showings. First, he must demonstrate that "extraordinary circumstances prevented him from filing his petition on time." *Id.* (citing *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996)). Second, he must show that he "acted with reasonable diligence throughout the period he seeks to toll." *Id.* (citing *Johnson*, 86 F.3d at 12).

Smaldone has failed to make the first showing; there was no cognizable impediment preventing him from filing his petition on time. The Fourth Circuit recently rejected a claim for equitable tolling on facts virtually identical to those presented by the present motion. *See Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000). In that case, the petitioner's attorney advised him that he had one year from a Maryland court's denial of his post-conviction challenge to file his habeas petition, notwithstanding the fact that ten and one-half months of the AEDPA statute of limitations period had run before that post-conviction challenge was filed. *See id.* at 326-27. The petitioner subsequently filed his habeas petition within the one-year period recommended by counsel, but beyond the actual expiration of the statute of limitations. *See id.* at 327.

The petitioner argued that he was entitled to equitable tolling because of the " 'negligent and erroneous advice' " of counsel and because the law at the time counsel provided the advice was unclear. *Id.* at 328. The court rejected the

contention, concluding that "a mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in to give the party the benefit of the erroneous understanding." *Id.* at 331.

Other courts have likewise rebuffed claims for equitable tolling raised by habeas petitioners based on attorney error or lack of clarity in the law. *See United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) ("The petitioners' argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest. The deadline was simply missed."); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) ("Normally, . . . a lawyer's mistake is not a valid basis for equitable tolling, and nothing in the present case justifies relaxing this rule; forcing the defendant to defend against the plaintiff's stale claim is not a proper remedy for negligence by the plaintiff's lawyer." (internal citation omitted)); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (denying equitable tolling when petition was late because attorney used regular mail rather an express service to send petition); *Meiggs v. Pinkens*, No. C 99-33638, 2000 WL 101245, at *3 (N.D.Cal. Jan. 20, 2000) ("Ignorance of the deadline — whether on the part of the petitioner herself or due to the petitioner's attorney's negligence — does not merit equitable tolling for the delay caused by such ignorance.").

These cases are consistent with those addressing claims for equitable tolling of statutes of limitations in other contexts. *See Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 96 (1990) ("[T]he principles of equitable tolling . . . do not

extend to what is at best a garden variety claim of excusable neglect.")[3]; *South v. Saab Cars USA*, 28 F.3d 9, 12 (2d Cir. 1994) ("[L]ack of due diligence on the part of plaintiff's attorney is insufficient to justify application of an equitable toll."); *Gilbert v. Secretary of Health & Human Servs.*, 51 F.3d 254, 257 (Fed.Cir.1995) ("The negligence of [plaintiff's] attorney [in misreading statute of limitations provision] does not justify applying equitable tolling.").

Finally, petitioner's contention that the statute of limitations should be equitably tolled because he suffered from ineffective assistance of counsel is defeated by the absence of a right to counsel in state post-conviction (or federal habeas) proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Therefore, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Id.* Where the state is obligated by the Sixth Amendment to provide competent counsel, constitutionally ineffective performance by an attorney is "imputed to the State" and therefore is considered a factor "external" to the habeas petitioner. *Id.* at 754. In other situations, however, where there is no constitutional right to

---

3. The Supreme Court in *Irwin* noted that equitable tolling has been permitted in cases "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 96. At oral argument, petitioner's counsel contended that this principle supported equitable tolling in this case because Adler had, in effect, been "tricked" by *Valentine*. This argument is meritless. Tolling is available in the situation described in *Irwin* so that a party to litigation will not benefit from its own misconduct. No such concerns apply here. Respondent had nothing to do with Adler's reliance on *Valentine*.

counsel, "the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Id.* at 753 (internal quotation marks omitted).

CONCLUSION

For these reasons, the petition is dismissed as untimely. I make no determination regarding the issuance of a certificate of appealability. If petitioner intends to seek one from this Court, he should do so by letter brief with citation to authority that would authorize such a certificate.

So Ordered.

s/ John Gleeson
John Gleeson, U.S.D.J.

Dated: August 3, 2000
Brooklyn, New York

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 14, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 CV 2225 (SJ)

FRANK SMALDONE,

Petitioner,

-against-

D.A. SENKOWSKI, Superintendent of Clinton Correctional Facility,

Respondent.

* * *

MEMORANDUM AND ORDER

JOHNSON, District Judge:

Frank Smaldone ("Smaldone" or "Petitioner"), appearing *pro se*, and after having commenced a habeas corpus proceeding pursuant to 28 U.S.C. § 2254, seeks to hold his habeas petition in abeyance until his pending state post-conviction appeals have been exhausted. Petitioner is also requesting appointment of counsel. For the reasons set forth herein, Petitioner's motion is denied and his application for habeas relief is dismissed without prejudice.

Appendix C

BACKGROUND

Petitioner currently has a N.Y. Crim. Proc. L. § 440.10 post-conviction appeal pending before Justice McGann in Queens County. Petitioner filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in this court on April 24, 1997. That same day, Petition filed motions to hold his habeas petition in abeyance and for appointment of counsel. Petitioner did not submit a Memorandum of Law in Support of his Habeas Petition asserting the grounds of his appeal. However, Petitioner states in the motion presently before this court that the issues in his § 440.10 appeal are intertwined with the issues to be presented in his habeas petition.

Although Respondent would consent to the holding of Petitioner's § 2254 petition in abeyance, he argues in the alternative that the petition should be dismissed due to petitioner's failure to exhaust state remedies.

DISCUSSION

A federal court may not review the merits of a petition for a writ of habeas corpus unless the petitioner has exhausted all the remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *Picard v. Connor*, 404 U.S. 270, 275 (1971). A claim is deemed to be exhausted when it has been presented " 'to the highest court of the pertinent state.' " *Bossett v. Walker*, 41 F.3d 825, 828 (2d. Cir. 1994) (quoting *Pesina v. Johnson*, 913 F.2d. 53, 54 (2d. Cir. 1990)), *cert. denied*, __U.S.__, 115 S. Ct. 1436 (1995). The exhaustion doctrine gives the state court a fair opportunity to pass upon all of the federal claims asserted in the petition so that it may correct any constitutional error before the federal habeas court addresses it. *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

Appendix C

Upon petitioner's admission and respondent's concurrence that petitioner's state court remedies have not been exhausted, this court cannot hold petitioner's habeas petition in abeyance and must dismiss petitioner's habeas corpus petition without prejudice. After petitioner's state court remedies have been exhausted, he may timely refile his § 2254 habeas petition in federal court. Petitioner is reminded that the recent amendment to the habeas corpus statute imposes a one-year statute of limitations for filing non-capital habeas corpus petitions in federal court. Antiterrorism and Effective Death Penalty Act of 1996, Title I, § 106(b), Pub.L. No. 104-132, 110 Stat. 1214 (April 24, 1996). In most cases, the one year period will start to run on the date on which the state court judgment became final by the conclusion of direct review, although the statute of limitations is tolled while a properly filed application for state post-conviction or other collateral review is pending. 28 U.S.C. § 2244(d).

Because this court is dismissing petitioner's habeas petition, his request for appointment of counsel is deemed moot and is dismissed as well.

CONCLUSION

Accordingly, and without reaching the merits of any of Mr. Smaldone's claims, the habeas petition is dismissed without prejudice.

So Ordered.

Dated: September 19, 1997
Brooklyn, New York

s/ (illegible)
U.S.D.J.